Filed 6/14/2001

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JULIO CESAR SALAS, Defendant and Appellant.	B141709 (Super. Ct. No. BA182622)

APPEAL from a judgment of the Superior Court of Los Angeles County. William F. Fahey, Judge. Affirmed in part; reversed in part with directions.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, William T. Harter, Supervising Deputy Attorney General, Victoria B. Wilson, and Michael R. Johnsen, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication except for parts III.A., the heading for part III.B., and the entirety of part III.C.

I. INTRODUCTION

Defendant, Julio Cesar Salas, appeals from his convictions after a jury trial for attempted murder (Pen. Code,[1] §§ 664, 187, subd. (a)) and conspiracy to commit murder. (§ 182, subd. (a)(1).) The jury also found: the attempted murder was willful, deliberate, and premeditated; the crime was committed for the benefit of, at the direction of, and in association with, a criminal street gang; and a principal personally used and intentionally discharged a firearm in the attempted commission of the murder. (§§ 186.22, subd. (b)(1), 12022.53, subds. (b), (c), (d), & (e)(1), 12022.5, subd. (a)(1).) There was no finding defendant personally used a firearm. In the published portion of the opinion, we discuss whether defendant is subject to the 15-year minimum term set forth in section 186.22, subdivision (b)(5) for attempted willful, deliberate, and premeditated murder. Section 12022.53, subdivision (e)(2) defines when a defendant in a gang related case where a firearm is used may be subject to a 15-year minimum parole eligibility date. We conclude defendant is subject to the seven-year minimum parole eligibility date in section 3046, subdivision (a)(1) based on the present record because there was no finding he personally used a firearm. (§ 12022.53, subd. (e)(2).) In reaching this conclusion, it is necessary to evaluate the interplay of sections 186.22, subdivision (b)(5) and 12022.53, subdivision (e). We remand for a limited retrial on the issue of whether defendant personally used a firearm.

II. THE FACTS

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) On March 7, 1999, defendant, a member of a gang, and two other individuals were riding in a blue Cadillac. They drove

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

near a party held by another gang. As Robert Aguilar, a "former" member of the other gang, got out of his car, the driver of the Cadillac and his two passengers alighted their automobile. The Cadillac driver fired several shots at Mr. Aguilar. Mr. Aguilar was shot and later underwent surgery. Defendant and his two companions got into the Cadillac and fled. Los Angeles Police Officer Curtis Morton heard the gunshots. He saw the blue Cadillac and began to follow it. When the blue Cadillac collided with a street corner, two passengers got out and ran away. Defendant was arrested. Defendant was the registered owner of the Cadillac.

There was no unequivocal direct evidence as to the identity of the person who actually fired the shots that struck Mr. Aguilar. Mr. Aguilar testified as to the identity of the person who fired the shots as follows: "The driver. The driver got out and had the gun that I saw." Defendant was the driver of the Cadillac involved in the short pursuit after Mr. Aguilar was shot which ended in an accident. No gun was found inside the Cadillac after defendant's arrest. As noted previously, two other individuals jumped out of the Cadillac and fled at the conclusion of the brief police pursuit. When interviewed by the police, defendant stated that one of the passengers in the Cadillac fired at the rival gang members, hitting Mr. Aguilar.

III. DISCUSSION

[The indicated portion of part III.A. and the heading of part III.B. are deleted from publication. See *post* at page 10, where publication is to resume.]

Defendant was interviewed by Detective Rick Peterson following his arrest. Prior to the interview, defendant was read his constitutional rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, 444. Defendant waived his rights both orally and in writing. Defendant agreed to speak to Detective Peterson. Defendant discussed his involvement in the shooting incident. Thereupon, Detective Peterson began tape

recording their conversation. Defendant was unaware that their conversation was being tape recorded.

Prior to trial in this case, defendant moved to suppress the tape recording of his statements to police. At a hearing conducted on the motion pursuant to Evidence Code section 402, defendant argued that he was unaware that his interview was being tape recorded. Therefore, he believed that he was "just talking" with the police. He was aware that Detective Herman was taking notes. Defendant believed that a statement would be produced for him to review. In fact, a statement was prepared, which defendant signed without objection. Defendant further argued that before the tape recording was made, he should have been readvised of his rights. During the interview, defendant asked Detective Peterson, "'Is any of this going to get out?'" Detective Peterson indicated it would not. During the interview, defendant indicated: "But I'm -- I'm probably thinking about what's gonna happen -- uh, what's gonna happen to me in the county, though, right?" Defendant clarified that he meant the county jail. Detective Peterson told defendant, "Well, nobody's gonna know that you're saying anything to us." Thereafter, Detective Peterson asked if the other individuals involved knew where defendant's family lived. Detective Peterson told defendant: "[T]here's things that could possibly be done. We can't make those deci - -- I can't sit here and promise you anything. [¶] . . . [¶] But the thing is that as long as -- if you'd be honest and truthful with us, we'll do everything we can as -- as far as to try to help you work with this thing. But, you know, what you're giving us right now, what you're telling us, there's not a whole lot what we can do." Defendant later inquired who else would know what he had told the detectives: "Just you guys and -- and the what, public -- what the public defender, or what, the D.A. or whatever?" Detective Peterson responded that the case would be presented to the district attorney. In denying the motion to suppress, the trial court noted: "It was unclear the extent to which it [the statement] would be disseminated, but importantly the detectives told the defendant that it was going to the D.A., and that is something that I think is consistent with the [*Miranda*] admonition. [¶] Because I think the defendant

was probably sufficiently intelligent to understand that it goes to the D.A. It's going to be used against him."

Defendant argues that his tape-recorded statement was inadmissible. Both the United States and California Supreme Courts have held, "[A] suspect may not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and to appointed counsel in the event the suspect is indigent. [Citations.]" (*People v. Sims* (1993) 5 Cal.4th 405, 440, citing *Miranda v. Arizona, supra,* 384 U.S. at pp. 444-445, 473-474.) The California Supreme Court has held, "Statements elicited in violation of this rule are generally inadmissible in a criminal trial. [Citations.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 732, citing *Miranda v. Arizona*, *supra*, 384 U.S. at pp. 492, 494.) In reviewing alleged *Miranda* violations: "'"We must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. [Citations.] However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained."' (*People v. Bradford* [1997] 14 Cal.4th [1005,] 1033.) 'We apply federal standards in reviewing defendant's claim that the challenged statements were elicited from him in violation of *Miranda*.' (*Ibid.*)" (*People v. Box* (2000) 23 Cal.4th 1153, 1194; *People v. Whitson* (1998) 17 Cal.4th 229, 248; *People v. Samayoa* (1997) 15 Cal.4th 795, 829; *People v. Crittendon* (1994) 9 Cal.4th 83, 128; *People v. Johnson* (1993) 6 Cal.4th 1, 25; *People v. Boyer* (1989) 48 Cal.3d 247, 263, disapproved on another point in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

In *People v. Samayoa, supra,* 15 Cal.4th at pages 829-830, the California Supreme Court noted: "It is well established, however, that a suspect does not invoke his or her right to remain silent merely by refusing to allow the tape recording of an interview, unless that refusal is accompanied by other circumstances disclosing a clear intent to speak privately and in confidence to others. (*People v. Johnson* [*supra,*] 6 Cal.4th [at pp.] 25-26 [].)" The *Samayoa* court found that the defendant's indication that he did not want his statement tape recorded following an explicit waiver of his *Miranda* rights and

immediately followed by incriminating admissions that were transcribed by the officer present was "not inconsistent with a willingness to discuss the case freely and completely." (*Id.* at p. 830; see also *People v. Davis* (1981) 29 Cal.3d 814, 823-826 [defendant's taped statement, which was a repetition of his previous statement, was properly admitted as willingly given].) In this case, defendant unequivocally waived his right to remain silent and agreed to speak with the detectives. He responded affirmatively to the waivers and signed his name to the form advisement. His signature was affixed at approximately 10:30 a.m. During both the unrecorded and recorded portions of the interview, defendant observed that Detective Herman was taking notes of what was being said. Defendant signed a statement prepared from those notes at approximately 11:05 a.m.

However, defendant argues that the use of a tape recorder required that he be readvised of his *Miranda* rights because the original advisement was not "'reasonably contemporaneous'" with the initial interrogation. The California Supreme Court has determined *Miranda* does not require that the accused be readvised of his or her rights prior to each separate subsequent interrogation following the original advisement and waiver. (*People v. Johnson* (1969) 70 Cal.2d 469, 477; see also *People v. Thompson* (1992) 7 Cal.App.4th 1966, 1972-1973; *People v. Johnson* (1973) 32 Cal.App.3d 988, 997; *People v. Inman* (1969) 274 Cal.App.2d 704, 707-708.) In this case, defendant was unaware of the activation of a tape recorder. However, defendant saw Detective Herman taking notes. Defendant expected that a statement would be prepared for his signature. He was also told that the information would be given to the prosecution. Defendant neither changed his mind nor requested that the interview be terminated. Defendant's explicit knowing and voluntary waiver of his rights was not altered by the activation of a tape recorder and was reasonably contemporaneous to the recorded statement. Accordingly, the trial court did not err in denying defendant's motion to suppress his tape-recorded statement.

Defendant's further argument that his statement was coerced because the detectives "essentially told [him] that his statements would not be used against him in a

court of law" and they promised him "leniency" by saying they would help him must also be rejected. To be admissible, a confession must be the voluntary product of a rational intellect and free will. (*Blackburn v. Alabama* (1960) 361 U.S. 199, 208; *People v. Holt* (1997) 15 Cal.4th 619, 663.) The voluntariness of the confession is tested on the basis of the totality of the circumstances, the accused, and the interrogation. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226; *People v. Johnson*, *supra,* 70 Cal.2d at p. 476.) The California Supreme Court has determined: "In general, '"any promise made by an officer or person in authority, express or implied, of leniency or advantage to the accused, if it is a motivating cause of the confession, is sufficient to invalidate the confession and to make it involuntary and inadmissible as a matter of law."' [Citations.]" (*People v. Ray* (1996) 13 Cal.4th 313, 339-340; *People v. Hogan* (1982) 31 Cal.3d 815, 838.) However, the Supreme Court clarified, "[W]e have made clear that investigating officers are not precluded from discussing any 'advantage' or other consequence that will 'naturally accrue' in the event the accused speaks truthfully about the crime. [Citation.]" (*People v. Ray, supra,* 13 Cal.4th at p. 340; *People v. Hill* (1967) 66 Cal.2d 536, 550.) Here, no promises or threats were made by the interviewing detectives. Defendant objects to the following statement: "You gotta get the whole truth, everything out on the table and let us deal with it. It's the only way it's gonna help you." Defendant argues this clearly implied that once he told the truth the detectives would help him gain favorable treatment. We disagree. Defendant was aware that criminal proceedings would be initiated. It was he who asked if his statement would be sent to the public defender or the district attorney. Defendant had been previously arrested and convicted for carrying a loaded firearm. He was certainly aware that what he was saying would be used in court against him; he was explicitly so advised orally and in writing. Based on the totality of the circumstances, the statements made by defendant were voluntary. (*People v. Hill, supra,* 66 Cal.2d at p. 550; see also *People v. Kelly* (1990) 51 Cal.3d 931, 950.)

Nonetheless, any error would be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Cahill* (1993) 5 Cal.4th 478, 509-510.)

Defendant was observed fleeing the scene of a gang-related shooting in his bullet riddled blood stained Cadillac and immediately arrested thereafter. No defense was presented. The overwhelming evidence of guilt was uncontradicted. Any purported error was harmless.

B. The Minimum 15-Year Term

[The remainder of part III.B. is to be published.]

We asked the parties to brief the issue of whether the 15-year minimum parole eligibility term specified in section 186.22, subdivision (b)(5) may be applied to defendant's conviction for willful, deliberate, and premeditated attempted murder. In count 1, defendant was charged with attempted willful, deliberate, and premeditated murder within the meaning of section 664, subdivision (a).[2] Additionally, it was alleged the attempted murder was committed for the benefit of, at the direction of, and in association with, a criminal street gang within the meaning of section 186.22, subdivision (b)(1).[3] Further, it was alleged that a principal in the offense, the attempted willful,

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[2] Section 664, subdivision (a) states in relevant part: "(a) If the crime attempted is punishable by imprisonment in the state prison, the person guilty of the attempt shall be punished by imprisonment in the state prison for one-half the term of imprisonment prescribed upon a conviction of the offense attempted. However, if the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole."

[3] Section 186.22, subdivision (b)(1) states: "Except as provided in paragraph (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of two, three, or four years at the court's discretion, except that if the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall

deliberate, and premeditated murder, personally and intentionally discharged a firearm. (§ 12022.53, subds. (b), (c), (d), & (e)(1).) Finally, it was alleged a principal personally used a firearm with the meaning of section 12022.5, subdivision (a)(1).

The jury was never instructed that defendant must personally use a firearm in order for any enhancement to be returned. Rather, the jury was instructed only that a "principal" must use a firearm. The jury was instructed as follows: "It is alleged in Count 1 that a principal intentionally and personally discharged a firearm and proximately caused great bodily injury to Robert Aguilar. [¶] If you find defendant Salas guilty of the crime charged, you must determine whether a principal intentionally and personally discharged a firearm and proximately caused great bodily injury to Robert Aguilar. [¶] The word 'firearm' includes a handgun. [¶] Great Bodily Injury in this section means a significant or substantial physical injury. Minor, trivial, or moderate injuries do not constitute great bodily injury. Great bodily injury is proximately caused by the discharge of a firearm if it is a direct, natural, and probable consequence of the discharge of the firearm, and if, without the discharge the firearm, great bodily injury would not have occurred. [¶] The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true."

The jurors never found defendant personally used a firearm. Rather, the jury findings concerning firearm use were as follows: "We further find the allegation that in the commission and attempted commission of the above offense that a principal personally and intentionally discharged a firearm, to wit: a handgun, which proximately caused great bodily injury to ROBERT AGUILAR, within the meaning of Penal Code Section 12022.53(d) and (e)(1) to be True. [¶] We further find the allegation that in the commission and attempted commission of the above offense that a principal personally and intentionally discharged a firearm, to wit: a handgun, within the meaning of Penal

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be punished by an additional term of five years. If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years."

Code Section 12022.53(c) and (e)(1) to be True. [¶] We further find the allegation that in the commission and attempted commission of the above offense that a principal personally used a firearm, to wit: a handgun, within the meaning of Penal Code Sections 12022.5(a)(1) and 12022.53(b) and (e)(1) to be True."

In terms of the count 2 conspiracy findings, the jurors found four alleged overt acts to be true. The findings were as follows: "That defendant Julio Salas agreed with co-suspects, fellow [] gang members to do a drive-by on rival [] gangmembers"; "That defendant Julio Salas drove with armed co-suspects into rival [gang] territory"; "That defendant stopped his car in rival [gang] territory at the direction of co-suspects"; and "That co-suspects shot a rival [] gangmember, hitting Robert Aguilar." There was no finding that defendant personally used a firearm within the meaning of section 12022.5, subdivision (a)(1).

The trial court sentenced defendant as follows as to count 1. For willful, deliberate, and premeditated attempted murder, defendant received a life sentence. (§ 664, subd. (a).) Pursuant to section 186.22, subdivision (b)(5), the trial court ordered defendant serve a minimum 15-year term before he could be paroled. Additionally, as to count 1, the court imposed a consecutive term of 25 years to life for firearm use pursuant to section 12022.53, subdivision (d). Defendant also received a sentence for conspiracy to commit murder as charged in count 2. The sentence under count 2 was stayed pursuant to section 654, subdivision (a). Defendant argues the section 186.22, subdivision (b)(5) 15-year minimum term was improperly imposed as to count 1. We agree.

Section 186.22, subdivisions (b)(1) and (5) state in pertinent part: "Except as provided in paragraph (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of two, three, or four years at the court's discretion,

except that if the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years. If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years. [¶] . . . [¶] (5) Except as provided in paragraph (4), any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life, shall not be paroled until a minimum of 15 calendar years have been served." The effect of section 186.22, subdivision (b)(5) is to increase the minimum parole eligibility date on a willful, deliberate, and premeditated attempted murder sentence. Absent a determination the accused is subject to the enhanced sentencing provisions of section 186.22 or some other provision of law, a sentence for willful, deliberate, and premeditated murder is for a life term with a minimum wait for parole of seven years. (§ 3046, subd. (a)(1)[4].) However, once a finding pursuant to section 186.22, subdivision (b)(5) is returned, the minimum wait for parole eligibility under a life sentence is increased to 15 years. (See *People v. Jefferson* (1999) 21 Cal.4th 86, 90; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1465; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 485-486.)

Defendant is correct in his assertion that since he was never found to have *personally* used a firearm, the section 186.22, subdivision (b)(5) 15-year minimum parole eligibility term is inapplicable to this case. This is because of the provisions of section 12022.53, subdivision (e) which state: "(1) The enhancements specified in this section shall apply to any person [] charged as a principal in the commission of an offense that includes an allegation pursuant to this section when a violation of both this section and subdivision (b) of Section 186.22 are pled and proved. [¶] (2) An enhancement for participation in a criminal street gang pursuant to Chapter 11 (commencing with

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4 Section 3046, subdivision (a) states: "No prisoner imprisoned under a life sentence may be paroled until he or she has served the greater of the following: [¶] (1) A term of at least seven calendar years. [¶] (2) A term as established pursuant to any other provision of law that establishes a minimum term or minimum period of confinement under a life sentence before eligibility for parole."

Section 186.20) of Title 7 of Part 1, shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense." Section 12022.53, subdivision (e)(1) increases the scope of potential liability for firearm use in a case where there is a finding pursuant to section 186.22. (See *People v. Gonzales* (2001) 87 Cal.App.4th 1, 14-15.) Section 12022.53, subdivision (e)(1) extends potential liability under the firearm enhancement when the accused, in a gang case, does not personally use the weapon. Section 12022.53, subdivision (b) requires the imposition of a 10-year term when the accused "personally used a firearm." Section 12022.53, subdivision (c) requires the imposition of a 20-year term in state prison when the defendant "intentionally and personally discharged a firearm." Section 12022.53, subdivision (d), the firearm use provision applicable to the present case, requires the imposition of a 25-year-to-life sentence consecutive to that imposed for the underlying felony when the accused "personally discharged a firearm and proximally caused great bodily injury . . . or death." Section 12022.53, subdivision (e)(1) creates an exception to the *personal* use requirement of section 12022.53, subdivisions (b) through (d) in a prosecution where findings have been made pursuant to section 186.22, such as occurred in this case. In a case where section 186.22 has been found to be applicable, in order for section 12022.53 to apply, it is necessary only for a principal, not the accused, in the commission of the underlying felony to personally use the firearm; *personal* firearm use by the accused is not required under these specific circumstances. However, as a consequence of this expanded liability under section 12022.53, subdivision (e), the Legislature has determined to preclude the imposition of an additional enhancement under section 186.22 in a gang case unless the accused *personally* used the firearm. In the present case, the jury never found that defendant personally used a firearm. The only findings made by the jury were that a principal in the commission of the offense personally used a firearm. Therefore, section 12022.53, subdivision (e)(2) prevents the imposition of the 15 year minimum term specified in section 186.22, subdivision (b)(5).

In this narrow respect, the judgment must be reversed. This is an issue which affects the sentence only. Defendant argues that his case should not be remanded for retrial on the limited issue of whether he personally used a firearm in the commission of the attempted murder. He argues the information "fails to plead that [he] personally used or discharged a firearm." He further argues that the prosecutor made no motion to amend the information to allege personal gun use by defendant. However, the information specifically alleges, "[A] principal personally used a firearm, a handgun, within the meaning of Penal Code sections 12022.5(a)(1) and 12022.53(b) and (e)(1)." Section 12022.5, subdivision (a)(1) provides, "[A]ny person who personally uses a firearm in the commission or attempted commission of a felony shall, upon conviction of that felony or attempted felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony . . . be punished by an additional term of imprisonment in the state prison for 3, 4, or 10 years . . . ." Defendant is a principal in this case. The prosecution is correct that it is entitled to attempt to prove defendant personally fired the gun. Buttressing this analysis is the evidence the driver of the car fired the handgun and the information specifically adverts to section 12022.5, subdivision (a)(1), which refers to personal firearm use. Therefore, we agree with the Attorney General that this matter should be remanded for a limited retrial on the question of whether defendant personally used a firearm. (*Monge v. California* (1998) 524 U.S. 721, 728-734; *People v. Hernandez* (1998) 19 Cal.4th 835, 843.) If the trier of fact is unable to find that defendant personally used a firearm, then the sentence for willful, deliberate, and premeditated attempted murder must be a life term with a seven-year parole eligibility date as required by sections 664, subdivision (a), 3046, subdivision (a)(1), and 12022.53, subdivisions (d) and (e). In the event that the trier of fact finds that defendant personally used a firearm, then the sentence for willful, deliberate, and premeditated attempted murder must be a life term with a 15-year parole eligibility date as required by sections 664, subdivision (a), 3046, subdivision (a)(2), and 12022.53, subdivisions (d) and (e).

[The following indicated portions of part III.C. including the heading are deleted from publication. See *post* at page 18 where publication is to resume.]

C. Abstract Of Judgment

There are errors in the abstract of judgment which warrant correction. (Cal. Rules of Court, rule 12(b); *People v. Olmsted* (2000) 84 Cal.App.4th 270, 278-279.) The abstract of judgment erroneously states defendant received a 25-year sentence for firearm use. That is incorrect. Defendant received a sentence of 25 years to life pursuant to section 12022.53 for firearm use. Further, the abstract of judgment fails to reflect defendant was found to be subject to a gang enhancement pursuant to section 186.22. That too must be included in the abstract of judgment. Once proceedings are completed after issuance of the remittitur, the clerk of superior court is ordered to prepare a correct abstract of judgment and forward it to the Department of Corrections.

[The balance of the opinion is to be published.]

IV. DISPOSITION

That portion of the judgment which imposes a 15-year minimum parole eligibility date pursuant to Penal Code section 186.22, subdivision (b)(5) is reversed. The cause is remanded for a limited retrial on the issue of whether defendant personally used a firearm. The judgment is affirmed in all other respects. Upon the conclusion of proceedings in the trial court after issuance of the remittitur, the clerk of superior court is

ordered to prepare a corrected abstract of judgment which accurately reflects the sentence imposed by the trial court including but not limited to the 25-year-to-life term imposed for firearm use and the finding pursuant to Penal Code section 186.22.

CERTIFIED FOR PARTIAL PUBLICATION

TURNER, P.J.

We concur:

GRIGNON, J.

WILLHITE, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.